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Prasit Punyang v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO R-05–252-09 OF 2011
AZAHAR MOHAMED, ROHANA YUSUF AND HAMID SULTAN JJCA
04 OCTOBER 2013

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted for trafficking in 937.5g of cannabis — Death sentence — Accused person caught at boat — Drugs found on accused person's body and boat — Whether drugs in boat belonged to accused person — Whether accused person aware and had required knowledge of drugs in boat — Whether trial judge adequately considered accused person's defence that he did not have knowledge of drugs in boat — Accused person's cautioned statement — Whether properly considered — Dangerous Drugs Act 1952

The appellant was charged and tried in the High Court for trafficking in 937.5g of cannabis, an offence under of the Dangerous Drugs Act 1952 ('the DDA'). PW5 and a police raiding team went to the scene to conduct an operation on drugs trafficking activities there. Earlier, the police had arrested one Yahya bin Zainol ('PW4') on suspicion that he was in possession of dangerous drugs. PW4 was then brought to the police station. According to PW4, at the police station he was asked to buy cannabis and he agreed. According to PW5, after about 15 minutes keeping watch, a boat approached the platform and there was no one else in the boat at that point of time except the appellant. The boat then stopped at the platform. When the appellant was about to tie the boat at the platform, PW5 and his team rushed to the boat and detained the appellant. A body search on the appellant revealed a slab of dried plant material suspected to be cannabis wrapped in a transparent plastic packet from a bag worn at the appellant's waist. The dried plant materials were confirmed to be 937.5g of cannabis. In his defence, the appellant admitted that he knew of the cannabis found in a brown bag worn at his waist. However, the appellant vehemently denied any knowledge of the presence of the cannabis hidden in the boat. The appellant denied that he pointed out to the police the place where the cannabis were hidden. The appellant, in support of his defence denying knowledge of the impugned cannabis, tendered a cautioned statement ('exh D1') that he made in the course of police investigation. The learned judicial commissioner ('JC') at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty prescribed by the DDA. In the present appeal, the main contention of the appellant was that the JC failed to adequately consider the defence of the appellant. In particular, the point taken was that the JC failed to consider the cautioned statement of the appellant, which was exculpatory in nature. It was further submitted that the

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failure on the part of the JC to take into consideration the cautioned statement was a serious non-direction which amounted to a misdirection rendering the conviction of the appellant to be unsafe.

Held, allowing the appeal:

(1) There was merit in the contention of the appellant. In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it was the bounden duty of the JC, at the conclusion of the trial, to consider all the evidence adduced before him and should decide whether the prosecution had proved its case beyond reasonable doubt. The legislature has advisedly used the term 'all the evidence'. The emphasis must be on the word 'all'. In the context of the present case, the cautioned statement tendered by the appellant was one of the evidence which the JC should take into consideration in order to make a finding whether or not the prosecution had proved its case beyond reasonable doubt. The aim of this provision was obviously to make certain that an accused person got a fair trial (see para 8).

(2) The general burden of proof laid throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the appellant for the offence with which he was charged. It would never shift. Whether the prosecution had proved its case beyond reasonable doubt depended upon the existence or otherwise of reasonable doubt in the evidence adduced before the court. It was a question of fact that the court had to determine at the conclusion of the trial with great care after taking into consideration the entire evidence and the circumstances prevailing in the case (see para 10).

(3) Generally, a self-serving or exculpatory cautioned statement was not in itself evidence of the truth asserted. However, it was the duty of the JC to consider and to analyse the cautioned statement that had been tendered as evidence by the appellant in support of his defence, that he had no prerequisite knowledge about the impugned cannabis found in the boat. The JC must consider carefully whether the cautioned statement was capable of raising a reasonable doubt on the prosecution case. The appellant's cautioned statement was recorded a day after the arrest of the appellant. It was important to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him. The defence of the appellant was not something that was sprung for the first time in the defence case. The impact of the totality of the cautioned statement on the prosecution case or innocence of the appellant had to be kept in mind in coming to the conclusion as to the guilt of the appellant. However, the JC had failed to adequately direct his mind as to the truth of the appellant's version as stated in the cautioned statement (see para 11).

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(4) As a trial judge, the JC had a duty to consider and scrutinise the cautioned statement and to make his own findings why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole. The court was unable to conclude that even if the JC were to direct himself correctly on the cautioned statement, he would have come to the same irresistible conclusion in that the appellant knew the offending drugs were hidden in the boat. The appellant might have lost a chance which was fairly opened to him of being acquitted. As a result, there had been occasioned a failure or a miscarriage of justice, which had the effect of rendering the conviction very unsafe (see paras 13 & 15).

[Bahasa Malaysia summary

Perayu dituduh dan dibicarakan di Mahkamah Tinggi kerana mengedar 937.5g kanabis, satu kesalahan di bawah Akta Dadah Berbahaya 1952 ('ADB'). PW5 dan sepasukan polis serbuan telah ke tempat kejadian untuk menjalankan operasi ke atas aktiviti pengedaran dadah di sana. Sebelum itu, pihak polis telah menahan Yahya bin Zainol ('PW4') atas syak wasangka bahawa dia memiliki dadah berbahaya. PW4 kemudiannya dibawa ke balai polis. Menurut PW4, di balai polis, dia diminta membeli kanabis dan dia bersetuju. Menurut PW5, selepas 15 minit memerhati, sebuah bot menghampiri pelantar dan tidak terdapat orang lain dalam bot tersebut ketika itu kecuali perayu. Bot kemudiannya berhenti di pelantar. Apabila perayu hendak mengikat bot pada pelantar, PW5 dan pasukannya menyerbu ke arah bot dan menahan perayu. Carian badan ke atas perayu mendedahkan satu mampatan bahan tumbuhan kering yang disyaki kanabis dibungkus dalam bungkusan plastik lutsinar daripada beg yang dipakai pada pinggang perayu. Bahan tumbuhan mampat tersebut disahkan sebagai 937.5g kanabis. Dalam pembelaannya, perayu mengakui bahawa dia mengetahui mengenai dadah yang dijumpai dalam beg berwarna coklat yang dipakai pada pinggangnya. Walau bagaimanapun, perayu dengan kerasnya menafikan sebarang pengetahuan mengenai adanya kanabis yang disembunyikan dalam bot. Perayu menafikan bahawa dia yang menunjukkan kepada pihak polis tempat di mana kanabis tersebut disembunyikan. Perayu, dalam menyokong pembelaannya menafikan pengetahuan mengenai kanabis tersebut, mengemukakan kenyataan beramaran ('eksh D1') yang dibuat olehnya semasa siasatan polis. Pesuruhjaya kehakiman ('PK'), pada penutup perbicaraan, menyabitkan perayu dan menjatuhkan hukuman mati mandatori yang dinyatakan dalam ADB. Dalam rayuan ini, hujahan utama perayu adalah bahawa PK gagal untuk mempertimbangkan pembelaan perayu secukupnya. Khasnya, hujahan yang dinyatakan adalah bahawa PK gagal mempertimbangkan kenyataan beramaran perayu, yang mana bersifat membebaskan. Selanjutnya dihujahkan bahawa kegagalan PK untuk mengambil kira kenyataan beramaran adalah tiada arah diri serius yang terjumlah kepada salah arah, menyebabkan sabitan perayu tidak selamat.

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Diputuskan, membenarkan rayuan: A

(1) Terdapat merit dalam hujahan perayu. Selaras dengan peruntukan s 182A(1) Kanun Tatacara Jenayah, adalah menjadi tugas PK, pada penutup perbicaraan, untuk mempertimbangkan kesemua keterangan yang dikemukakan kepadanya dan sewajarnya memutuskan sama ada pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Badan perundangan telah menggunakan terma 'kesemua keterangan' dengan pertimbangan. Penekanan mestilah diberikan pada perkataan 'kesemua'. Dalam konteks kes ini, kenyataan beramaran yang dikemukakan oleh perayu adalah keterangan yang mana PK harus pertimbangkan untuk membuat dapatan sama ada atau tidak pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Matlamat peruntukan ini jelas adalah untuk memastikan orang yang bersalah mendapat perbicaraan yang adil (lihat perenggan 8). B C D

(2) Beban pembuktian am yang dibentangkan sepanjang perbicaraan ke atas pihak pendakwaan adalah untuk membuktikan bahawa kebersalahan perayu melampaui keraguan munasabah atas kesalahan yang mana dia dipertuduh. Ia tidak akan berganjak. Sama ada pihak pendakwaan membuktikan kesnya melampaui keraguan munasabah bergantung pada wujud atau tidak keraguan munasabah dalam keterangan yang dikemukakan di hadapan mahkamah. Ia adalah persoalan fakta bahawa mahkamah perlu menentukan kepada penutup perbicaraan dengan berhati-hati selepas mengambil kira kesemua keterangan dan hal keadaan yang timbul dalam satu-satu kes (lihat perenggan 10). E F

(3) Secara amnya, suatu kenyataan beramaran yang mempunyai kepentingan untuk diri atau yang membebaskan tertuduh dari tuduhan tidak dengan sendirinya membuktikan kebenaran. Walau bagaimanapun, adalah tugas PK untuk mempertimbangkan dan menganalisa kenyataan beramaran yang telah dikemukakan sebagai keterangan bagi menyokong pembelaannya, bahawa dia tidak mempunyai pengetahuan yang diperlukan mengenai kanabis yang dijumpai dalam bot. PK mestilah mempertimbangkan sama ada kenyataan beramaran berkeupayaan membangkitkan keraguan munasabah ke atas kes pendakwaan dengan berhati-hati. Kenyataan beramaran perayu direkodkan sehari selepas penahanan perayu. Adalah penting untuk menunjukkan bahawa perayu ada menyebut fakta asas dalam pembelaannya pada peringkat awal semasa pihak polis menyiasatnya. Pembelaan perayu bukanlah sesuatu yang ditimbulkan buat kali pertama dalam kes pembelaan. Kesan keseluruhan kenyataan beramaran ke atas kes pendakwaan atau ketidakbersalahan perayu harus diingat dalam membuat kesimpulan mengenai kebersalahan perayu. Walau bagaimanapun, PK gagal mengarahkan mindanya secukupnya G H I

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kepada kebenaran versi perayu seperti yang dinyatakan dalam kenyataan beramaran (lihat perenggan 11).

(4) Sebagai hakim bicara, PK mempunyai tugas untuk mempertimbangkan dan meneliti kenyataan beramaran dan membuat dapatan mengenai mengapa, sekalipun jika beliau tidak mempercayai kenyataan beramaran tersebut, ia tidak membangkitkan keraguan munasabah ke atas keseluruhan kes pendakwaan. Mahkamah tidak boleh memutuskan bahawa sekalipun PK mengarahkan diri beliau dengan betul kepada kenyataan beramaran, beliau akan membuat keputusan yang tidak boleh dielakkan bahawa perayu tahu bahawa dadah-dadah tersebut disembunyikan di dalam bot. Perayu mungkin kehilangan peluang yang terbuka kepadanya secara adil untuk dilepaskan. Akibatnya, berlaku satu kegagalan atau ketidakadilan, yang mempunyai kesan menyebabkan sabitan tidak selamat (lihat perenggan 13 & 15).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Ahmad Mukamal bin Abdul Wahab & Anor v PP [2014] 1 MLJ 865; [2013] 4 CLJ 949, CA (refd)
Ayoromi Helen v PP [2005] 1 MLJ 699; [2005] 1 CLJ 1, CA (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Lim Hock Boon v PP [2007]1 MLJ 46, CA (refd)
Masoumeh Gholami Khaveh v PP [2013] 5 MLJ 688; [2013] 5 CLJ 59, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mraz v The Queen (1955) 93 CLR 493, HC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
Tan Ewe Huat v PP [2004] 1 MLJ 559; [2004] 1 CLJ 521, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code s 182A(1)
Dangerous Drugs Act 1952 ss 2, 39B(1)(a), 39B(2)

Appeal from: *Criminal Trial No 45A-4 of 2010 (High Court, Perlis)*

S Vijaya Retnam @ Veizay (Veizay & Co) for the appellant.
Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Azahar Mohamed JCA (delivering judgment of the court):

[1] Prasit Punyang ('the appellant'), was charged and tried in the High Court at Kangar for trafficking in dangerous drugs, namely 937.5g of cannabis, an offence under of the Dangerous Drugs Act 1952 ('the DDA'), and punishable under s 39B(2) of the DDA. The offence was said to have been committed on 19 May 2010 at about 6.30pm in a boat at Pelantar Ikan Kampung Tandiap, Kuala Perlis, in the District of Kangar, in the State of Perlis.

[2] The learned judicial commissioner ('JC') at the conclusion of the trial convicted the appellant and sentenced him to the mandatory death penalty prescribed by the DDA. The appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously allowed it. We now give the reasons of our decision.

[3] The facts of the case, which the learned JC held made out a prima facie case against the appellant, have been set out in his judgment. Very briefly, the facts adduced by the prosecution giving rise to the charge against the appellant were as follows. On 19 May 2010 at about 6pm, Inspector Zulpaka bin Aidiee ('PW5') and a police raiding team went to the Pelantar Ikan at Kg Tandiap, Kuala Perlis to conduct an operation on drugs trafficking activities there. Earlier, the police had arrested one Yahya bin Zainol ('PW4') on suspicion that he was in possession of dangerous drugs. PW4 was then brought to the police station. According to PW4, at the police station he was asked to buy cannabis and he agreed. In this regard, the material part of the evidence of PW4 is as follows:

> Di cawangan narkotik anggota narkotik telah buat pemeriksaan terhadap isteri saya dan telah jumpa sejenis ganja. Saya mengaku itu adalah milik saya, tapi anggota narkotik tidak mahu tahan saya tetapi mahu tahan isteri saya. Polis kemudian minta saya beli barang ganja. Saya setuju.
>
> Saya kemudian telefon ke Thailand. Saya berhubung dengan Mail. Saya beritahu saya mahu beli ganja sekilo. Mail suruh saya telefon balik.
>
> Pada hari itu pukul 4.00 petang saya telefon balik Mail. Mail suruh saya tunggu di Kuala Perlis untuk ambil barang. Harga satu kilo telah ditetapkan. Saya tidak ingat. Jumlah dalam RM20.00 lebih.

[4] As the facts unfolded, according to PW5, after about 15 minutes keeping watch, he saw a boat approaching the platform. No one else was in the boat at that point of time except the appellant. The boat then stopped at the platform. When the appellant was about to tie the boat at the platform, PW5 and his team rushed to the boat. PW5 then introduced himself as police and detained the appellant. According to PW5, he conducted body search on the appellant and found a slab of dried plant material wrapped in a transparent plastic packet

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from a bag worn at the waist of the appellant. PW5 suspected the dried plant material to be cannabis and he seized it. PW5 then asked the appellant whether he had in possession of any other drugs. Continuing with his evidence, this is what PW5 said:

> Selepas jumpai barang tersebut saya tanya kepada lelaki tersebut. Saya tahan lelaki tersebut dan rampas barang tersebut.
>
> Saya ada bercakap dengan lelaki tersebut. Hasil perbicaraan (sic) saya jumpai satu plastik berwarna kuning bertulisan Thailand bahagian belakang bot tersebut. Di dalamnya terdapat satu bungkusan plastik berwarna hitam mengandungi ketulan mampat daun-daun kering disyaki dadah berbahaya dibalut dengan plastik lutsinar dan aluminium fosil.
>
> P15C, D & E dirujuk dan dicamkan.
>
> Saya tanya lelaki tersebut kiranya dia ada simpan apa-apa dadah lain. Lelaki tersebut jawab ya dan terus tunjuk bahan ganja belakang bot tersebut. Selepas itu dia bawa saya ke belakang bot dan dia sendiri ambil bungkusan plastik warna kuning dan serahkan bungkusan tersebut kepada saya.

[5] Subsequently, the dried plant materials were sent to the Chemistry Department for chemical examination and analysis. The dried plant materials were confirmed by the chemist, Puan Maharyani binti Mat Saad ('PW1') to be cannabis as defined in s 2 of the DDA, weighing in total 937.5g. This formed the subject matter of the present appeal.

[6] At the conclusion of the case for the prosecution, the learned JC came to the finding that the prosecution had made out a prima facie case against the appellant and therefore called upon the appellant to enter his defence in respect of the offence charged. The appellant elected to give sworn evidence. The appellant admitted that he knew of the cannabis found in a brown bag worn at his waist. However, the appellant vehemently denied any knowledge of the presence of the cannabis hidden in the boat. The appellant denied that he pointed out to the police the place where the cannabis were hidden. The appellant, in support of his defence denying knowledge of the impugned cannabis, tendered a cautioned statement (exh D1) that he made in the course of police investigation.

[7] When the appeal came before us, one of the main contentions of learned counsel for the appellant was that the learned JC erred in failing to adequately consider the defence of the appellant. In particular, the point taken was that the learned JC failed to consider the cautioned statement of the appellant, which is exculpatory in nature in so far as the present charge is concerned. Learned counsel argued that the failure on the part of the learned JC to take into consideration the cautioned statement is a serious non-direction which

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amounts to a misdirection rendering the conviction of the appellant to be unsafe.

[8] On the facts of the present case, we find there is merit in the contention of learned counsel for the appellant. In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider *all* the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term 'all the evidence'. The emphasis must be on the word 'all'. In the context of the present case, the cautioned statement tendered by the appellant is one of the evidence which the learned JC should take into consideration in order to make a finding whether or not the prosecution has proved its case beyond reasonable doubt. The aim of this provision is obviously to make certain that an accused person gets a fair trial. In the recent case of *Ahmad Mukamal bin Abdul Wahab & Anor v Public Prosecutor* [2014] 1 MLJ 865; [2013] 4 CLJ 949, Hamid Sultan Abu Backer JCA in delivering the judgment of this court has explained that the trial court has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned statement of the accused) or for that matter a story by the accused to reach a just result.

[9] It must be pointed out that in the cautioned statement, which was recorded on 20 May 2010, the appellant admitted that he was in possession of the cannabis found in a brown bag worn at his waist, but the appellant denied any knowledge of the presence of drugs hidden in the boat. This is what the appellant said in his cautioned statement:

S : Cuba kamu ceritakan kepada saya kenapa kamu ditangkap polis?

J : Pada 19/05/2010 jam lebih kurang pukul 1830 hrs, semasa saya tengah tengok orang baiki enjin di perahu sebelah, polis sampai, terus tangkap dan buat pemeriksaan pada badan saya seterusnya polis bawa saya ke perahu yang saya bawa tadi. Pihak polis telah menjumpai dadah dalam perahu yang saya bawa. Selepas itu mereka tahan dan bawa saya ke Balai Polis Kangar dan seterusnya saya ditahan di lokap hinggalah hari ini.

S : Adakah kamu membawa apa-apa dadah?

J : Ada, dalam beg pinggang saya.

S : Apakah jenis dadah tersebut?

J : Ganja.

S : Adakah kamu jual dadah tersebut?

J : Tidak

S : Bagaimana dadah tersebut boleh berada dalam beg pinggang kamu?

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J :	Mail yang suruh saya hantar pada kawan dia di Kuala Perlis.
S :	Adakah kamu kenal dengan kawan Mail?
J :	Saya tak kenal.
S :	Adakah kamu tahu ada dadah lain selain pada beg pinggang kamu?
J :	Saya tidak tahu.
S :	Macam mana dadah tersebut boleh berada dalam perahu?
J :	Saya tak tahu. Cuma yang saya tahu pada beg pinggang yang saya pakai.
S :	Adakah kamu menjalankan aktiviti penjualan dadah?
J :	Tak.
S :	Dadah yang kamu bawa, kepunyaan siapa?
J :	Nama panggilan Mail.
S :	Adakah kamu selalu hantar dadah ke Malaysia?
J :	Tidak.
S :	Adakah perahu tersebut kepunyaan kamu?
J :	Tidak.
S :	Siapakah tuan punya perahu tersebut?
J :	Mail.
S :	Di manakah Mail berada?
J :	Pulau Puju Thailand.
S :	Siapakah yang menjumpai dadah dalam perahu tersebut?
J :	Polis.
S :	Adakah kamu nampak polis tersebut menjumpai dadah dalam perahu?
J :	Ya.

[10] There is no doubt that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the appellant for the offence with which he was charged. It never shifts. Whether the prosecution has proved its case beyond reasonable doubt depends upon the existence or otherwise of reasonable doubt in the evidence adduced before the court. It is a question of fact that the court has to determine at the conclusion of the trial with great care after taking into consideration the entire evidence and the circumstances prevailing in the case. In *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169, the Supreme Court said as follows:

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To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt?

[11] It is true that generally a self-serving or exculpatory cautioned statement is not in itself evidence of the truth asserted therein. But then, it is the duty of the learned JC to consider and to analyse the cautioned statement that has been tendered as evidence by the appellant in support of his defence, that he had no prerequisite knowledge about the impugned cannabis found in the boat. The learned JC must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The appellant's cautioned statement was recorded a day after the arrest of the appellant. It is important, therefore, to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him. It follows from this that the defence of the appellant in the present case was not something that was sprung for the first time in the defence case (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561). The impact of the totality of the cautioned statement on the prosecution case or innocence of the appellant has to be kept in mind in coming to the conclusion as to the guilt of the appellant. However, in this case, the learned JC in his judgment merely said *'semasa di lokap OKT memberi percakapan beliau kepada polis yang dimasukkan sebagai DI'* (see p 529 of the appeal record). Tellingly, however, the learned JC had failed to adequately direct his mind as to the truth of the appellant's version as stated the cautioned statement (see *Tan Ewe Huat v Public Prosecutor* [2004] 1 MLJ 559; [2004] 1 CLJ 521).

[12] In opposing this appeal, the learned deputy public prosecutor ('DPP') argued that even though there has been a non-direction on the part of the learned JC concerning the cautioned statement, nevertheless that has not occasioned a substantial miscarriage of justice to the appellant and that there was sufficient evidence to justify the conviction.

[13] We are unable to agree with the learned DPP's submissions. As a trial judge, the learned JC had a duty to consider and scrutinise the cautioned statement and to make his own findings why even if he did not believe the cautioned statement, it did not raise a reasonable doubt on the prosecution's case as a whole (see *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577). The learned JC did not make any specific finding on this important aspect of the defence. We do not have the benefit of the learned JC's

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audio-visual advantage of hearing the evidence of the appellant to arrive at any factual finding on this issue.

[14] Moreover, for the proper determination of this issue, it is significant to note that PW4 is an important witness. He was asked by the police to purchase 1kg of cannabis. He then contacted one 'Mail' from Thailand for the supply of the cannabis. PW4 never contacted the appellant. 'Mail' was never called by the prosecution. Although the appellant also mentioned the name of 'Mail' in his cautioned statement, it appears that no investigation was carried out by the police pertaining to 'Mail'. Having examined the evidence led by the prosecution, we find the evidence left questions unanswered, especially the role of 'Mail'. It is against this backdrop, we are of the view that at the conclusion of the trial, the learned JC should have properly addressed his mind in connection with the cautioned statement of the appellant in deciding whether the prosecution has proved its case beyond reasonable doubt. As stated earlier, in his defence, the appellant vehemently denied any knowledge of the presence of the cannabis hidden in the boat. The appellant also denied that he pointed out to the police the place where the cannabis were hidden. The fact that the defence is not a recent fabrication is supported by the contents of the appellant's cautioned statement which is substantively similar to his defence advanced (see *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; [2005] 1 CLJ 1). It was then the duty of the learned JC to consider the defence of the appellant in the light of the cautioned statement that he had given to the police a day after he was arrested. On the facts of the present case, the failure on the part of the learned JC to consider and evaluate the appellant's cautioned statement constituted a serious non-direction which amounts to a misdirection, warranting appellate intervention. Such a misdirection is an appealable error.

[15] On the facts of the instant case, we are unable to conclude that even if the learned JC were to direct himself correctly on the cautioned statement, he would have come to the same irresistible conclusion in that the appellant knew the offending drugs were hidden in the boat. Viewed in this way, the appellant may thereby have lost a chance which was fairly opened to him of being acquitted. As a result, there had been occasioned a failure or a miscarriage of justice, which has the effect of rendering the conviction very unsafe, (see *Mraz v The Queen* (1955) 93 CLR 493 quoted with approval in *Lim Hock Boon v Public Prosecutor* [2007]1 MLJ 46 and *Masoumeh Gholami Khaveh v Public Prosecutor* [2013] 5 MLJ 688; [2013] 5 CLJ 59). For that reason, we do not agree with the learned DPP that we should invoke the proviso to s 60 of the Courts of Judicature Act 1964.

[16] This appeal was therefore, allowed. Accordingly, we quashed and set

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aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.

Appeal allowed.

Reported by Afiq Mohamad Noor